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West Palm Beach, FL 33409  
3 561-684-3222  
*Pro Hac Vice*

4 CHARLES K. BRUNN (CBN: 28021)  
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6 P.O. Box 3366 (95353)  
7 Modesto, California 95354

8 Attorneys for Plaintiff  
FIREMAN'S FUND INSURANCE COMPANY,  
9 a foreign corporation a/s/o BASIC RESOURCES, INC.  
and GEORGE REED, INC., a foreign corporation

10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 FIREMAN'S FUND INSURANCE  
COMPANY, a foreign corporation  
14 a/s/o BASIC RESOURCES, INC.  
and GEORGE REED, INC., a foreign  
15 corporation,

16 Plaintiff,

17 vs.

18 GERLING AMERICA INSURANCE  
COMPANY, a foreign corporation,

19 Defendant.

) CASE NO. C 07 06302 CRB

)  
) **SECOND SUPPLEMENTAL**  
) **DECLARATION OF JON D. DERREVERE**  
) **IN SUPPORT OF PLAINTIFF'S MOTION**  
) **FOR COURT TO TAKE JUDICIAL**  
) **NOTICE OF COURT RECORDS OF**  
) **UNDERLYING STATE COURT ACTION,**  
) **MOTION FOR FINAL SUMMARY**  
) **JUDGMENT AND FOR ALL OTHER**  
) **PURPOSES [F.R.E.201]**

) **Hearing Date: August 8, 2008**

) **Time: 10:30 a.m.**

) **Courtroom: 8**

21  
22 **TO: THE HONORABLE COURT AND TO DEFENDANT AND COUNSEL OF RECORD:**

23 I, JON D. DERREVERE, declare as follows:

24 1. I am an attorney at law duly admitted to practice in the State of Florida, and have  
25 been granted the privilege to appear before this Court pro hac vice on behalf of the Plaintiff,  
26

27  
28  
SECOND SUPPLEMENTAL DECLARATION OF JON D. DERREVERE IN SUPPORT OF PLAINTIFF'S MOTION  
FOR COURT TO TAKE JUDICIAL NOTICE OF COURT RECORDS OF UNDERLYING STATE COURT  
ACTION, MOTION FOR FINAL SUMMARY JUDGMENT AND FOR ALL OTHER PURPOSES

1 FIREMAN'S FUND INSURANCE COMPANY a/s/o BASIC RESOURCES, INC. and GEORGE  
2 REED, INC. ("FFIC").

3 2. I am a principal in the law firm of Derrevere, Hawkes & Black.

4 3. I am over the age of twenty-one. I am otherwise sui juris. I have personal knowledge  
5 of the facts contained herein and if called upon to do so, I could and would testify competently  
6 thereto.

7  
8 4. At all times material, I have acted as lead counsel for Plaintiff FFIC in the  
9 "Underlying Action", entitled "FIREMAN'S FUND INSURANCE COMPANY, a foreign  
10 corporation as Subrogee of (a/s/o) BASIC RESOURCES, INC. and GEORGE REED, INC.,  
11 foreign corporations vs. GENCOR INDUSTRIES, INC., a foreign corporation, Case No.: 2004-CA-  
12 7746, In the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida". I  
13 litigated this case through a jury trial which resulted in a Verdict for FFIC. Based on the Verdict, an  
14 Amended Final Judgment was entered in favor of FFIC as well as a Final Judgment awarding costs.  
15 True and correct copies of The Judgments are attached to the Fourth Amended Complaint in this  
16 action (D.E. 29, 29-2 and 29-3). Herein, FFIC has sued Defendant GERLING AMERICAN  
17 INSURANCE COMPANY ("GERLING"), which at all times material, was the liability carrier for  
18 the Defendant, in the Underlying Action, "GENCOR". FFIC sues GERLING seeking declaratory  
19 relief and damages for GERLING's breach of contract [its insurance policy insuring GENCOR at  
20 all times material (D.E. 29-1)] for GERLING's failure to pay FFIC, as the victorious plaintiff in the  
21 Underlying Action, those Judgment awards entered against GERLING's insured pursuant to the  
22 terms of the subject GERLING policy (D.E. 29, 29-1, 29-2, 29-3).

23  
24 5. FFIC has requested the Court take judicial notice of certain court records identified  
25 in my first Declaration [D.E. 36-1] in my First Supplemental Declaration [D.E. 49-2] and herein of  
26 the trial transcripts as well as other documents of record in the Underlying State Court Action,  
27  
28

pursuant to Federal Rule of Evidence 201. See: Plaintiff's Motion for Court to take Judicial Notice of Court Records in the Underlying State Court Action to assist the Court in its consideration of Plaintiff's Motion for Summary Judgment and to enable Plaintiff to comply with Civ.L.R. 7-5. I, Jon D. Derrevere, declare that incorporated herein by reference and/or attached hereto as Composite Exhibit 1 are true and correct copies of Trial Exhibit 3, Bates Stamped Pages 280, 423-424, which also comprise Composite Exhibit 1 of the testimony of Ron Souza. See: [D.E. 49-2, Comp. Ex. 1, Tr. Vol. 1, Page 93-105; Tr. Vol. 5, 618-640].

6. I, Jon D. Derrevere further declare that attached hereto as Exhibit 2 is Plaintiff's Interrogatory No. 16 together with Defendant, GERLING's Answer to No. 16.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States. Executed on this 30th day of June 2008 in West Palm Beach, Florida.

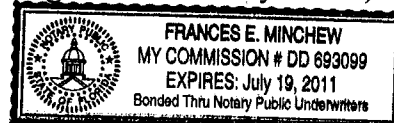
JON D. DERREVERE

STATE OF FLORIDA:

COUNTY OF PALM BEACH:

The foregoing instrument was acknowledged before me this 30th day of June, 2008, by Jon D. Derrevere, who is personally known to me and/or who is personally known to me. He did not take an oath.

Frances E. Minchew  
(Signature of Notary Public)



(Typed name of Notary Public)  
Notary Public, State of :  
Commission No. \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

**PROOF OF SERVICE**

*Fireman's Fund Ins. Co. v. Gerling American Ins.*

United States District Court, Northern District of California

Case No.: C 07 06302 CRB

I am employed in the City and County of West Palm Beach, State of Florida. I am over the age of 18 and not a party to the within action; my business address is: Derrevere, Hawkes & Black, 470 Columbia Drive, Building "B", West Palm Beach, Florida 33409.

On July 1st, 2008, I served the foregoing document(s) described as:

**SECOND SUPPLEMENTAL DECLARATION OF JON D. DERREVERE IN SUPPORT OF PLAINTIFF'S MOTION FOR COURT TO TAKE JUDICIAL NOTICE OF COURT RECORDS OF UNDERLYING STATE COURT ACTION, MOTION FOR FINAL SUMMARY JUDGMENT AND FOR ALL OTHER PURPOSES**

On the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed enveloped addressed as stated below:

**[X] BY REGULAR MAIL:**

I caused such envelopes to be deposited in the United States Mail at West Palm Beach, Florida with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with United States postal service each day and that practice was followed in the ordinary course of business for the service herein attested to.

**[X] BY ECF:**

I HEREBY CERTIFY that on this 1st day of July, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on: TINO X. DO, Barger & Wolen, LLP, 650 California Street, 9<sup>th</sup> Floor, San Francisco, CA 94108, tdo@barwol.com and CHARLES K. BRUNN, Brunn & Flynn, 928 12<sup>th</sup> Street, Suite 200, P.O. Box 3366, Modesto, CA 95354, CBrunn@Brunn-Flynn.com via transmission of Notices of Electronic Filing generated by CM/ECF.

**[X] FEDERAL** - I declare that I am employed in the office of a member of the Florida Bar, admitted to practice in all Florida Courts and who makes this Pro Hac Vice Application, that our co-counsel and sponsor is a member of the bar of this California Court, and at their direction this service was made. Executed at West Palm Beach, Florida on July 1st, 2008.

NAME: *Deanna N. Menendez*

Signature: *Deanna N. Menendez*

**Composite Exhibit “1”**



**BASIC RESOURCES, INC.**

5/18/01

Mark Wardlow  
Bank of America  
1601 "I" Street  
2nd Floor  
Modesto, CA 95354

This is authorization to wire transfer on behalf of George Reed Inc., six hundred seventy one thousand two hundred fifty nine dollars and no/100 (\$671,259.00) on Monday, May 21, 2001 as follows:

Payee: Gencor Industries, Inc.  
Contact: Pete Ruess at (407) 290-6000 ext 224

Bank: AmSouth Bank  
111 N. Orange Avenue Suite 600  
Orlando FL

ABA: 062-000-019


Account No.: 3720-420854

Please charge our account #14819-52005. Thank you for your assistance in this matter.

Sincerely,



John Shoden  
Treasurer



Mark Anderson  
Controller

Wendell, here is a very preliminary cost analysis of repairs to Hot Plant from the accident. This is prior to Larry Tipton giving me his thoughts or the Gencor people giving me theirs.

The increase in cost for Lodi Jobs if we have to pave them out Munn & Perkins could approach \$150,000.00. Detailed analysis is forthcoming.

Ron Souza

## CLEMENTS HOT PLANT REBUILD

### Disassemble Damage from Accident

			Labor	Equip	Materials	Rent & Subs	Total
<u>Cold Feed System w/Feed Conveyor</u>							
Labor	8	\$325	\$2,600				\$2,600
Equipment	8	\$100		\$800			\$800
Rental & Subs	8	\$5				\$40	\$40
							\$3,440
<u>Dryer, Primary, Baghouse</u>							
Labor	24	\$325	\$7,800				\$7,800
Equipment	24	\$100		\$2,400			\$2,400
Rental & Subs	24	\$5				\$120	\$120
							\$10,320
<u>Batch Tower &amp; Elevator</u>							
Labor	24	\$325	\$7,800				\$7,800
Equipment	24	\$100		\$2,400			\$2,400
Rental & Subs	24	\$5				\$120	\$120
							\$10,320
<u>Asphalt Storage Tank &amp; Heat Exchanger</u>							
Labor	4	\$325	\$1,300				\$1,300
Equipment	4	\$100		\$400			\$400
Rental & Subs	4	\$5				\$20	\$20
							\$1,720
<u>Control House</u>							
Labor	8	\$325	\$2,600				\$2,600
Equipment	8	\$100		\$800			\$800
Rental & Subs	8	\$5				\$40	\$40
							\$3,440
<u>Silo System &amp; Truck Scale</u>							
Labor	4	\$325	\$1,300				\$1,300
Equipment	4	\$100		\$400			\$400
Rental & Subs	4	\$5				\$20	\$20
							\$1,720
<u>Misc. Tool Rental</u>						\$2,000	\$2,000
<u>Rental for 60' Manlift</u>						\$3,000	\$3,000
<u>Pipe, steel, valves, etc.</u>							\$10,000
							\$15,000
			\$23,400	\$7,200	\$0	\$5,360	\$45,960



**Erection & Re-installation****Feed Conveyor**

Labor	8	\$55				\$440
Equipment	8	\$15				\$120
Materials						\$0
Rental & Subs	4	\$500				\$2,000
						\$2,560

**Dryer, Primary, Baghouse**

Labor	200	\$55				\$11,000
Equipment	200	\$15				\$3,000
Materials						\$0
Rental & Subs	24	\$500				\$12,000
						\$26,000

**Batch Tower & Elevator**

Labor	200	\$55				\$11,000
Equipment	200	\$15				\$3,000
Materials						\$0
Rental & Subs	20	\$500				\$10,000
						\$24,000

**Control House**

Labor	16	\$55				\$880
Equipment	16	\$15				\$240
Materials						\$0
Rental & Subs	4	\$500				\$2,000
						\$3,120

**Misc. Tool Rental**

Rental for 60' Manlift						\$2,000
Pipe, steel, valves, etc.						\$3,000
						\$10,000
						\$15,000
						\$70,680

**RECAP & PARTS COST:**

Cold feed system w/feed conveyor						50,000
Dryer						100,000
Batch Tower						50,000
Primary Cyclone						58,883
Baghouse						333,564
Control Center						50,000
						\$642,447
Less Discounts						\$642,447
Freight on plant parts						\$50,000
Electrical						\$20,000
Foundations & Engineering						\$45,960
Erection & Installation						\$70,680
Taxes						\$150,000
						\$979,087



**Exhibit “2”**

1 INTERROGATORY NO. 16

2 State the factual basis for your Fifteenth Affirmative Defense to Plaintiff's Second Amended  
3 Complaint.

4 RESPONSE TO INTERROGATORY NO. 16

5 Gerling objects to this Interrogatory to the extent that Defendant has filed an Answer with  
6 Affirmative Defenses to Plaintiff's Fourth Amended Complaint, the operative pleading in this  
7 action. Gerling also objects to this Interrogatory to the extent it seeks to impose burdens and/or  
8 obligations greater than that permitted by the Federal Rules of Civil Procedure. Gerling further  
9 objects to this Interrogatory to the extent that it seeks information protected by the attorney-client  
10 privilege, the work product privilege, or any other applicable privilege. Gerling objects to this  
11 Interrogatory as premature as Gerling has not completed its investigation of the facts relevant to this  
12 case, and has not completed its discovery or preparation for trial. Gerling's responses are therefore  
13 made only on the basis of such information as is currently known and reasonably available. Gerling  
14 reserves the right to introduce additional evidence at trial or to amend or supplement this response  
15 as appropriate. Subject to and without waiving any of the aforementioned objections, Gerling  
16 responds as follows:

17 Section IV, paragraph 4 of the Gerling policy states

18 Other Insurance

19 If other valid and collectible insurance is available to the insured for a loss we cover  
20 under Coverages A or B of this Coverage Part, our obligations are limited as follows:

21 a. Primary Insurance

22 This insurance is primary except when b. below applies. If this insurance is primary,  
23 our obligations are not affected unless any of the other insurance is also primary.  
24 Then, we will share with all that other insurance by the method described in c.  
25 below.

26 b. Excess Insurance

27 This insurance is excess over any of the other insurance, whether primary, excess,  
28 contingent or on any other basis:

(1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar  
coverage for 'your work';

(2) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner; or

(3) If the loss arises out of the maintenance or use of aircraft, 'autos' or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

...

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay of the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

...

FFIC's coverage of the damages from the explosion of the plant pursuant to its commercial general liability policy to George Reed/Basic Resources could be considered "other insurance" for the plant as the issue of whether Gencor's obligations under its written contract to sell the plant and provide services had been completed. Gerling is continuing the development of facts and legal research on this issue and reserves the right to modify or to enlarge its responses herein with such pertinent additional information as it may subsequently discover.

INTERROGATORY NO. 17

State the factual basis for your Sixteenth Affirmative Defense to Plaintiff's Second Amended Complaint.

RESPONSE TO INTERROGATORY NO. 17

Gerling objects to this Interrogatory to the extent that Defendant has filed an Answer with Affirmative Defenses to Plaintiff's Fourth Amended Complaint, the operative pleading in this action. Gerling also objects to this Interrogatory to the extent it seeks to impose burdens and/or obligations greater than that permitted by the Federal Rules of Civil Procedure. Gerling further objects to this Interrogatory to the extent that it seeks information protected by the attorney-client